TEN JOON HIONG v. CHAN SIEW GIM

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Syed Othman F.J.) May 5 & July 3, 1980]

[Kuching — Federal Court Civil Appeal No. 215 of 1979]

Practice and Procedure — Claim for possession of premises — Tenant dying before trial — Widow substituted as representative of estate — Order for possession made — Premises occupied by widow and her son — Widow and son not served in personal capacities — Leave given to widow and son to appear and defend action — R.S.C. 1957, O. 12 r. 25; O. 47 r. 1(1).

Landlord and Tenant — Claims for possession of premises — Tenant dying before trial — Widow substituted as representative of the estate — Order for possession made — Premises occupied by widow and son — Widow and son ought to be served in their personal capacities — Leave to defend given — Sarawak Rent Control Ordinance (Cap. 86).

In this case the respondent had brought an action to recover premises of which he claimed one William Lee was the licensee, whose licence had been terminated. William Lee resisted the claim and contended that he was a tenant. When the case came up for trial, it appeared that William Lee had died and thereupon counsel for the respondent applied that the appellant the widow be appointed to represent the estate of her deceased husband. At the hearing the appellant conceded to entry of judgment and an order for possession was made. The premises were occupied by the widow and her son but they had not been served in their personal capacities. Subsequently the respondent took steps to recover the premises and an order of possession was made, despite the objection of the widow and the son. The widow and the son appealed against this second order.

Held: (1) only by allowing the widow in her personal capacity and her son to come in as defendants may their rights, if any, to possession of the premises be fully investigated and properly determined;

(2) the order for possession must be set aside and leave be given to the widow in her personal capacity and the son to apply under Order 12 rule 25 of the Rules of the Supreme Court for leave to appear and defend.

Cases referred to:-

(1) *Tan Joo Eng (m.w.)* v. *Siang Heng Co. Ltd. & Ors.* [1957] M.L.J. 18.

(2) *Minet* v. *Johnson* 6 T.L.R. 417.

[The following authorities were also cited in argument: *Craig* v. *Kanseen* [1943] 1 All E.R. 108; *Indo-Australian Trading Co. Ltd.* v. *Lim Hoon & Anor.* [1961] M.L.J. 259; *Fleet Mortgage Investment Co. Ltd.* v. *Lower Maisonette* [1972] 2 All E.R. 737, 742.]

FEDERAL COURT.

K.C.I. Reddie for the appellant.

Tan Kok Chiang for the respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Lee Hun Hoe C.J. (Borneo)) (delivering the judgment of the Court): The plaintiff (respondent before us) is landlord of 96 Padungan Road, Kuching. She let the first floor to William Lee. She sued him for vacant possession, contending that he was only a licensee, not a tenant, whose licence had been terminated by effluxion of time. He resisted the claim, contending that he had a tenancy and that it was protected by the Sarawak Rent Control Ordinance, Cap. 86.

On May 9, 1979, when the case came up for trial, the court was told that he had died and thereupon counsel for the plaintiff landlord applied under Order 16 rule 46 for his widow to be appointed representative to defend the action. The learned trial judge consequently ordered that the widow be appointed to represent the estate of her husband, and thereafter she as representative of the estate was substituted for her deceased husband, as defendant (appellant before us).

It will be observed that this order and any order consequent thereon "shall" — in the words of Order 16 rule 46 — "bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter or proceeding."

On May 15, the defendant conceded to the entry of judgment and the learned judge accordingly ordered ("the first order") that the plaintiff recover possession from the defendant.

It will be observed that at this stage the defendant was before the court not in her personal capacity, but as representative of her husband's estate.

On June 19, 1979, the plaintiff sent the widow and her son, as occupiers, a copy separately of the first order and gave notice that if possession of the premises was not delivered up within 30 days, the plaintiff would levy execution proceedings against each of them. On the following day the plaintiff sent the widow, this time in her capacity as legal personal representative of the deceased's estate, a similar letter.

On August 7, 1979, the plaintiff took out a summons-in-chambers addressed to the widow in her representative capacity and secondly in her personal capacity, and to the son as occupier, for leave to issue a writ of possession to recover possession of the premises. The application was made under Order 47 rule 1(1). That Order reads:

"1. (1) A judgment or order that a party do recover possession of any immovable property may by leave to be obtained on *ex parte* application to the court or a judge supported by affidavit, be enforced by writ of possession. . . .

(2) Such leave shall not be given unless it is shown that all persons in actual possession of the whole or any part of the immovable property have received such notice of the proceedings as may be considered sufficient to enable them to apply to the Court for relief or otherwise.

2. Where by any judgment or order any person therein named is directed to deliver up possession of any immovable property to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed.

3. Upon any judgment or order for the recovery of any immovable property and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the successful party."

In her affidavit in support the plaintiff recited the above facts, said that the widow and son were in actual possession of the premises, and that despite the fact that the three letters had been sent to them and sufficient time had been given to them to vacate or apply to court for relief, they had deliberately ignored the order.

The widow and son opposed the application. In their affidavit they said that the first order was not binding on them as it was against the estate of the deceased and not against either of them personally; that they were not parties to the action brought by the plaintiff; that in that action the deceased pleaded that he was a protected tenant under the Rent Con-

trol Ordinance; that whether or not he was so could only have been determined after a trial; that there had been no such trial, that if there had been he might have satisfied the court that he was indeed a protected tenant, in which event he would have been a protected tenant until his death and accordingly no judgment would have been entered against him, and that following his death the widow and son would have been statutory tenants and the plaintiff would have had no right to evict them unless they contravened the Ordinance. Finally, they said that the law required the plaintiff to serve notice of the *proceedings* on both of them before judgment was obtained and that if they had been served they would have elected to defend the action by consenting to be parties to the proceedings, and that without a trial their rights to the premises would not be known, and that accordingly the plaintiff's application should be dismissed.

Over the objection of the widow and son, the learned judge on November 14, 1979, made an order ("the second order") granting the plaintiff leave to issue a writ of possession to recover possession from the widow in both her representative and personal capacities, and from the son.

It is from this order that this appeal has been lodged. (There is no appeal from the first order).

We are of the opinion that this appeal should be allowed and that the question of costs should be decided at the end of the trial which we think will eventually ensue.

This matter has become procedurally confused, due in the main to the fact that the learned judge has not kept clearly in mind that the widow has two capacities and whether and when she appeared in one or other capacity. Also, there was some uncertainty as to who has brought this appeal. The notice of appeal at page 35 shows that it is the widow in her representative capacity who is the appellant. There is nothing on the record to show that this appeal is by the widow in her personal capacity or by the son. Mr. Reddy in answer to our question said that he appeared before us representing the estate. This plainly is consistent with his stand throughout that the widow personally and the son have never been parties to the action, that any judgment obtained by the plaintiff cannot bind either of them as neither, it was said, could be affected by an order for possession, as neither had had an opportunity of being heard in the proceedings *in which the order was made.*

To get out of the confusion and in the interest of justice we should in our judgment allow the appeal — so as to enable the widow in her personal capacity and her son to take advantage of Order 12 rule 25 which reads:

"25. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of a court or a judge appear and defend on filing an affidavit showing that he is in possession of the land...."

In *Tan Joo Eng (m.w.)* v. *Siang Heng Co. Ltd. & Ors.*,[1] Whyatt C.J. said at page 19 that, although it might be said that the wording of this rule appears to contemplate that the application for leave should be made before judgment has been given, "it was held in *Minet* v. *Johnson*[2] that it is wide enough to include an application made *after* judgment has been signed and even *after* execution has been issued."

Only by allowing the widow in her personal capacity and her son to come in as defendants may their rights if any to possession of the premises be fully investigated and properly determined.

Accordingly we set aside the second order appealed from, and substitute therefor an order dismissing the plaintiff's application in the summons-in-chambers, and giving the widow in her personal capacity and the son to make application, if so advised, under Order 12 rule 25, for leave to appear and defend, such application to be made within thirty days of this judgment.

Order accordingly.

Solicitors: *Yong & Co.*

OH KENG SENG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Wan Suleiman F.J.) March 3 & July 14, 1980]
[Kuala Lumpur — Federal Court Criminal Appeal No. 39 of 1978]

Criminal Law and Procedure — Charge of sedition — Charge — Speech alleged to be seditious should be set out in charge — Amendment of charge — Sedition Act, 1948 (Revised 1969), ss. 3(1) and 4(1)(b).

This was an appeal from the decision of the High Court reported in [1979] 2 M.L.J. 174. On the appeal the question was raised whether the charge was proper.

Held: (1) in a charge of sedition it is not necessary to set out the particular words of the law defining sedition in the charge. What the law requires is that the speech or those parts of the speech alleged to be seditious should be set out in the charge and then it is for the court to decide having considered all the evidence whether those words mentioned are seditious;

(2) in this case the appellant knew full well what had been alleged against him, as his defence indicated;

(3) although the amendment to the charge was superfluous, the trial judge had power to amend the charge and the statutory requirements were complied with, so that the appellant was in no way prejudiced.

Cases referred to:-

(1) *Yoh Meng Heng* v. *Public Prosecutor* [1970] 1 M.L.J. 14.

(2) *Public Prosecutor* v. *Oh Keng Seng* [1977] 2 M.L.J. 206, 210.

FEDERAL COURT.

Yeap Ghim Guan for the appellant.

Mohamed Noor bin Haji Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): We dismissed this appeal and affirmed the conviction and sentence imposed by the learned trial judge. However an important point of law was raised during the hearing which requires a ruling by this court.

This appeal has a rather chequered history. Since the original charge preferred against appellant was the